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No. 79-1187

In the Supreme Court of the United States

OCTOBER TERM, 1979

CLAYTON M. FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The court of appeals issued no opinion, but entered a judgment order (Pet. App. A) affirming petitioner's conviction.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1979. On January 2, 1980, Mr. Justice Brennan signed an order extending the time within which to file a petition for a writ of certiorari to and including February 1, 1980. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was deprived of effective assistance of counsel.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on four counts of willfully failing to file federal income tax returns for the years 1974 through 1977, in violation of 26 U.S.C. 7203. He was fined $10,000 on Count One and sentenced to consecutive terms of six months' imprisonment on each of the first three counts. Imposition of sentence on Count Four was suspended and petitioner was placed on two years' probation to be served at the conclusion of the prison term (A. 35).[1]

The criminal information in which petitioner was charged was filed on January 12, 1979 by the United States Attorney for the Eastern District of Pennsylvania. Soon thereafter, petitioner appeared before the court without counsel, was arraigned, and entered a plea of not guilty (A.A. 1.1). Two weeks later, petitioner filed *pro se* motions to change venue and for a six-month continuance to permit him to select an attorney. The continuance was denied without prejudice, and the case was transferred to the Middle District of Pennsylvania (*ibid.*).

Following the transfer, the latter court *sua sponte* conducted a hearing to determine whether petitioner wished to be represented by counsel at trial and, if so, to explore the need for court-appointed counsel. At that hearing petitioner informed the court that he did not want

[1]"A." refers to the Appendix for the appellant and "A.A." refers to that of the appellee in the court of appeals.

to represent himself and that his attempts to obtain counsel had been unsuccessful (A.A. 2.1). When asked, he refused to give the court a date by which he expected to obtain counsel (*ibid.*).[2] The court then gave petitioner five additional days to find an attorney (*id.* at 2.1-2.2) and, when petitioner failed to do so, appointed H. Richard Agler, a tax lawyer and certified public accountant, to represent him at trial.

The jury was selected on March 2, 1979 (A. 1). Five days later, petitioner filed a *pro se* motion to dismiss the information for lack of jurisdiction (A.A. 3.1-3.10). The motion—in essence a constitutional attack on the federal income tax[3]—was denied because it was not filed by

[2]At the same hearing, the district court conducted an inquiry into petitioner's eligibility for appointment of counsel at government expense. The results of the inquiry were inconclusive (A.A. 2.1):

> The Defendant stated that he had in his own name no real estate, no bank account, and no stocks and bonds but declined to state whether or not he held title to an automobile or automobiles in his own name. He stated that he and his wife own as tenants by the entirety their residence which is subject to a $7200 mortgage and which cost $15,400.00 in 1969 but he stated that he did not know the present fair market value of the residence.

Accordingly, the court ordered petitioner to file a financial affidavit if he wished to have counsel provided at government expense (*id.* at 2.2). No such affidavit was ever filed.

[3]The motion to dismiss outlined petitioner's defenses, including claims that the Constitution provides no authority for Congress to enact criminal statutes under the Internal Revenue Code; that the constitutional power to tax is strictly civil; that the abandonment of the Gold Standard was unconstitutional; that Federal Reserve notes are not taxable income under the Internal Revenue Code; that the federal income tax is an indirect tax; and that the Internal Revenue Service instituted this proceeding to stifle First Amendment rights of the "National Tax Rebellion" (although petitioner disavowed membership in the tax rebellion).

counsel (A. 31). On March 21, petitioner's counsel sought a continuance of the trial until April 25 (*id.* at 32). That motion was denied on the ground that a challenge to the constitutionality or underlying legality of petitioner's prosecution could be asserted at any time during the proceedings or by way of a post-trial motion (A.A. 4.1-4.2).

At all events the jury did not begin to hear evidence until April 20. That morning, petitioner informed the court that on the previous day he had dismissed Agler as his attorney because Agler did not understand and was not qualified to present petitioner's jurisdictional defense. Petitioner stated that "[t]he kind of advice that I have gotten from him [Agler] was plea bargain, offer to file returns and this kind of thing" (A. 5). Petitioner added that "[e]ven if he was qualified to understand and defend this case * * *," Agler had, in the months preceding trial, been extremely busy preparing tax returns for other clients (*id.* at 5-6). Insisting that he did not want Agler to be his counsel and did not wish to represent himself at trial, petitioner asked the court for a continuance so that he could obtain suitable counsel (*id.* at 20). The court denied the request when petitioner proved unwilling or unable to tell the court how much additional time he would need (*id.* at 20-23); it ordered Agler to act as stand-by counsel to assist petitioner during the trial (*id.* at 28-29).

Petitioner adamantly refused to cross-examine witnesses or put on a defense at trial because he believed, contrary to advice from the court, Agler, and the prosecutor, that participation in the trial would constitute abandonment of his claim that the district court lacked jurisdiction over criminal violations of the Internal Revenue Code (A. 13-19).

ARGUMENT

Petitioner contends (Pet. 12-17) that he was deprived of effective assistance of counsel because H. Richard Agler, his court-appointed attorney, failed adequately to prepare for trial. He argues (*id.* at 16-17) that the district court was required either to appoint new counsel when he dismissed Agler or to grant him a continuance on the morning trial was to begin so that he could obtain counsel on his own.

Contrary to petitioner's claim, there was no showing that Agler was either unprepared for trial or incapable of presenting a defense to the charges in the information. Indeed, petitioner admitted in the district court that he had discussed the case with Agler on more than one occasion (A. 6),[4] and that he had had opportunities to

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[4]Although the record does not reveal the number of times Agler met with petitioner to discuss the case prior to trial, petitioner asserts (Pet. 9) that they met only twice. Agler's brief in support of the March 21 motion for a continuance (A. 32), together with his comments at the hearing during which the court was advised that petitioner no longer desired his services, suggest that petitioner understates the amount of contact between attorney and client. In any event, effective assistance of counsel is not measured in terms of the amount of time the attorney and client spend together, or even the number of hours the attorney devotes to preparation. Petitioner has made no showing whatsoever that Agler spent insufficient time preparing for trial to have provided reasonably effective assistance under the circumstances. See *United States* v. *Maguire*, 600 F. 2d 330, 332 (1st Cir. 1979), cert. denied, No. 79-5130 (Oct. 1, 1979); *Easter* v. *Estelle*, 609 F. 2d 756, 759 (5th Cir. 1980).

Petitioner seeks to bolster his claim by intimating (Pet. 17) that Agler's motion for a continuance establishes the inadequacy of his preparation. However, there is nothing in the record to suggest that once the motion was denied Agler failed to adjust his other commitments so as to prepare adequately for petitioner's trial within the time available. Moreover, because of the court's schedule the trial did not begin until April 20, just five days shy of the date sought in the motion for a continuance.

present to counsel "volumes" of information concerning his tax protest claims (A. 27-28). Petitioner told the court (*id.* at 5-6) that his primary reason for dismissing Agler was that the attorney, in petitioner's view, was incapable of presenting his tax protest claims at trial. But effective assistance of counsel has never been construed to require defense attorneys to present futile or frivolous motions or to urge meritless defenses.[5] See, *e.g.*, *United States* v. *Bosch*, 584 F. 2d 1113, 1121 (1st Cir. 1978); *United States* v. *Hart*, 557 F. 2d 162, 163 (8th Cir.), cert. denied, 434 U.S. 906 (1977).

Petitioner's contention that the district court was obliged to appoint new counsel to replace Agler is insubstantial. Petitioner never requested a second court-appointed counsel. Had he done so it is unlikely, in view of the nature of petitoner's complaints concerning Agler, that the court could have found any other attorney acceptable to him. Under the circumstances, the district court acted properly in appointing Agler to act as stand-by counsel to assist petitioner, if necessary, at trial. See *Faretta* v. *California*, 422 U.S. 806, 834 n.46 (1975); *United States* v. *Johnson*, 585 F. 2d 374, 376 (8th Cir. 1978), cert. denied, 440 U.S. 921 (1979).

Although petitioner did request a continuance, the district court did not err in denying it in view of petitioner's refusal to indicate how much time he would need to obtain a suitable attorney (A. 20-23). Petitioner

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[5]Petitioner's claims are outlined in note 3, *supra*. Similar claims have been raised in numerous cases (see, *e.g.*, *United States* v. *Whitesel*, 543 F. 2d 1176, 1180-1181 (6th Cir. 1976), cert. denied, 431 U.S. 967 (1977); *United States* v. *Gardiner*, 531 F. 2d 953, 955 (9th Cir.), cert. denied, 429 U.S. 853 (1976)), and have been rejected as being "clearly frivolous" (*United States* v. *Daly*, 481 F. 2d 28, 30 (8th Cir.), cert. denied, 414 U.S. 1064 (1973)).

had previously failed after a lengthy period to obtain an attorney on his own, and his eleventh-hour dismissal of Agler on questionable grounds promised to make the search for new counsel even more protracted. With government witnesses prepared to testify and a congested trial calendar (A.A. 5.1-5.3), the district court properly refused to tolerate any additional delay. It has been uniformly held "that the right to counsel 'cannot be * * * manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *United States* v. *Llanes*, 374 F. 2d 712, 717 (2d Cir.), cert. denied, 388 U.S. 917 (1967), quoting *United States* v. *Bentvena*, 319 F. 2d 916, 936 (2d Cir.), cert. denied, 375 U.S. 940 (1963). Accord, *United States* v. *Silva*, 611 F. 2d 78, 79 (5th Cir. 1980); *United States* v. *Fowler*, 605 F. 2d 181, 183 (5th Cir. 1979), cert. denied, No. 79-1097 (Mar. 31, 1980); *United States* v. *Davis*, 604 F. 2d 474, 485 (7th Cir. 1979); *United States* v. *Phifer*, 511 F. 2d 960 (4th Cir. 1975); *Bowman* v. *United States*, 409 F. 2d 225, 226 (5th Cir. 1969), cert. denied, 398 U.S. 967 (1970); *United States* v. *Abbamonte*, 348 F. 2d 700, 703-704 (2d Cir. 1965), cert. denied, 382 U.S. 982 (1966). Under the circumstances, the district court properly exercised its discretion in denying the motion for a continuance (see *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)), and petitioner was not thereby denied effective assistance of counsel.[6]

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[6]In his statement of questions presented (Pet. 2-4), petitioner purports to challenge as a violation of due process an alleged delay in the filing of the information underlying his conviction. However, petitioner has failed to even allude to that question in his argument and, accordingly, we do not address it here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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